

No. 12187

United States
Court of Appeals

for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY, a corporation, and JOSEPH HENRY HARRISON
and JANE DOE HARRISON, his wife,

Appellants,

vs.

EVELYN M. DeBUSE, Administratrix of the Estate of Charles De-
Buse, deceased, EVELYN M. DeBUSE, as Guardian ad Litem
for George D. DeBuse, a minor, and GERALD A. DUNN and
GLADYS E. DUNN, his wife,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

APR 4 - 1949

PAUL P. O'BRIEN,

CLERK

United States
Court of Appeals
for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD
COMPANY, a corporation, and JOSEPH HENRY HARRISON
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EVELYN M. DeBUSE, Administratrix of the Estate of Charles De-
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affirmation and Adoption of Statement of Points, Appellants (USCA).....	41
Appeal:	
Bond on.....	26
Certificate of Clerk to Transcript of Record on	36
Designation of Record on (DC).....	34
Designation of Record on (Appellants- USCA)	39
Designation of Additional Record on (Appel- lees-USCA)	42
Notice of.....	25
Statement of Points on (DC).....	35
Statement of Points on (USCA).....	41
Bond on Appeal.....	26
Bond on Removal.....	16
Certificate of Clerk of State Court.....	19
Certificate of Clerk to Transcript of Record on Appeal	36
Decision by Court on Motion to Remand, Oral...	28

	PAGE
Designation of Record on Appeal (Appellants-DC)	34
Designation of Record on Appeal (Appellants-USCA)	39
Designation of Additional Record on Appeal (Appellees-USCA)	42
Letter, dated Dec. 29, 1948, Millard P. Thomas, U. S. District Clerk to Norman Riddell, King County Clerk.....	22
Motion to Remand.....	20
Affidavit of Joe S. Pearson.....	21
Names and Addresses of Counsel.....	1
Notice of Appeal.....	25
Notice of Removal.....	18
Order of Remand.....	23
Petition for Removal.....	2
Exhibit A—Summons, Complaint, Motion for Appointment of Guardian ad Litem, Order for Appointment of Guardian ad Litem, Case No. 399916, Superior Court, State of Wash- ington for King County.....	5
Statement of Points, Appellants' Adoption of (USCA)	41
Statement of Points on Appeal (DC).....	35

NAMES AND ADDRESSES OF COUNSEL

MESSRS. THOMAS H. MAGUIRE and
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Attorneys for Appellants.

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840 Central Building
Seattle 4, Washington,
Attorneys for Appellants.

JOE PEARSON
of Messrs. Kahin, Carmody & Pearson,
835 Central Building,
Seattle 4, Washington,
Attorneys for Appellees.

HARRY B. JONES, Jr.,
of Messrs. Jones & Bronson,
610 Colman Building,
Seattle 4, Washington,
Attorneys for Appellees.

United States District Court for the Western
District of Washington, Northern Division

Civil No. 2112

EVELYN M. DeBUSE, Administratrix of the
Estate of Charles DeBuse, deceased; EVELYN
M. DeBUSE, as guardian ad litem for GEORGE
D. DeBUSE, a minor; and GERALD A. DUNN
and GLADYS E. DUNN, his wife,

Plaintiffs,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a corpora-
tion and JOSEPH HENRY HARRISON and
JANE DOE HARRISON, his wife,

Defendants.

PETITION FOR REMOVAL

To the Honorable Judges of the Above Entitled
Court:

Petition of the defendants above named for re-
moval of the above entitled action from the Superior
Court of the State of Washington for the County
of King to the above entitled court shows:

I.

That civil action was commenced in the Superior
Court of the State of Washington for the County
of King entitled: Evelyn M. DeBuse, Administra-
trix of the Estate of Charles DeBuse, deceased;
Evelyn M. DeBuse, as guardian ad litem for George
D. DeBuse, a minor; and Gerald A. Dunn and
Gladys E. Dunn, his wife, Plaintiffs, vs. Chicago,

Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and Joseph Henry Harrison and Jane Doe Harrison, his wife, Defendants, being No. 399916 of the files of the Clerk of said court, by the filing of complaint in the office of said Clerk on the 20th day of September, 1948.

That attached hereto and incorporated herein as Exhibit A is a copy of said complaint, summons, motion for appointment of guardian ad litem and order for appointment of guardian ad litem, the same being all of the papers heretofore so filed in said action.

That said action is pending wholly undetermined in said court within the district and division of the above entitled court without service of process upon or appearance by said defendants, or any of them.

II.

That in said action arising from a collision between certain vessels on Puget Sound in the State of Washington alleged to have been caused by the negligence of the defendants, the plaintiffs seek to recover for death, personal injury, and property injury aggregate damages in the sum of \$106,400.00 (exclusive of interest and costs) liability for all of which is denied by the defendants.

III.

That said action, involving an alleged maritime tort on the navigable waters of the United States, is an action over which the above entitled court has original jurisdiction because it arises under the construction and laws of the United States and within the admiralty and maritime jurisdiction thereof.

IV.

That the defendants have caused removal bond in the reasonable sum of \$500 to be executed by good and sufficient corporate surety, conditioned that the defendants will pay all costs and disbursements incurred by reason of removal, should it be determined that the case was not removable or was improperly removed.

Wherefore, the defendants pray that, upon the filing of satisfactory proof of removal having been duly perfected, the above entitled court will exercise its jurisdiction in said action for all further proceedings as required by law.

THOMAS H. MAGUIRE

BYRON E. LUTTERMAN

MERRITT, SUMMERS & BUCEY

/s/ LANE SUMMERS,

Attorneys for Defendants

(Duly Verified.)

EXHIBIT A

In the Superior Court of the State of Washington
for King County

No. 399916

EVELYN M. DeBUSE, Administratrix of the
Estate of Charles DeBuse, deceased; EVELYN
M. DeBUSE, as guardian ad litem for GEORGE
D. DuBUSE, a minor; and GERALD A. DUNN,
and GLADYS E. DUNN, his wife,

Plaintiffs,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a corpora-
tion, and JOSEPH HENRY HARRISON and
JANE DOE HARRISON, his wife,

Defendants.

SUMMONS

The State of Washington, To said Chicago, Mil-
waukee, St. Paul and Pacific Railroad Company, a
corporation and Joseph Henry Harrison and Jane
Doe Harrison, his wife, Defendant. You and each
of you are hereby summoned to appear in the Su-
perior Court of the State of Washington, for King
County, within twenty (20) days after service of
this summons upon you if served within the State
of Washington, and sixty (60) days if served out-
side the State of Washington, exclusive of the day
of service, and defend the above-entitled action.
And you are further required within said time to
answer the plaintiff's complaint, and serve a copy

Exhibit A—(Continued)

of your answer on the undersigned attorneys for plaintiffs, at their office in King County, Washington; said King County being the place designated by the plaintiffs as the place of trial of said action. You are further notified that in case of your failure so to do, judgment will be rendered against you according to the demands of the complaint, which will be filed with the clerk of said court, a copy of which is herewith served upon you.

KAHIN, CARMODY & PEARSON
Attorneys for Plaintiffs

P. O. Address 835 Central Building, County of King, Seattle, Washington.

[Title of Superior Court and Cause No. 399916.]

COMPLAINT

For the first cause of action herein the plaintiff, Evelyn M. DeBuse, as administratrix for the benefit of herself as the wife of the deceased, Charles DeBuse, and George D. DeBuse and Roberta DeBuse, minor children of the deceased, alleges:

I.

Plaintiff Evelyn M. DeBuse is the duly qualified and acting administratrix of the estate of Charles DeBuse, deceased, having been appointed in Probate Cause No. 108317 in the Superior Court of the State of Washington for King County, and as such brings this action on her own behalf as the widow of said deceased, Charles DeBuse, and on

Exhibit A—(Continued)

behalf of George D. DeBuse, aged fourteen years, and Roberta DeBuse, aged twelve years, the surviving children of said deceased.

II.

Plaintiff, Evelyn M. DeBuse, was on the 20th day of Sept. 1948, duly and properly appointed as guardian ad litem of the said minor, George D. DeBuse for the purpose of representing the said minor in this action pertaining to personal injuries received by him.

III.

That Gerald A. Dunn and Gladys E. Dunn are now, and were at all times hereinafter mentioned, husband and wife, and as such constitute a marital community under the laws of the State of Washington.

IV.

The defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, maintaining an office and transacting business within King County, State of Washington, as a common carrier and as such operates vessels and barges in the waters of Puget Sound and between cities located on Puget Sound.

V.

The defendants Joseph Henry Harrison and Jane Doe Harrison, his wife, are now and were at all times herein mentioned husband and wife and as such constitute a marital community under the

Exhibit A—(Continued)

laws of the State of Washington. The defendant Joseph Henry Harrison at all times herein mentioned was acting for and on behalf of the said community and the said corporation and within the course and scope of his authority as agent and servant of said corporation and as second mate on the steam tug Milwaukee, being a vessel owned and operated by the said corporation and drawing a barge at the time and place hereinafter mentioned.

VI.

On July 25, 1948, the deceased, Charles DeBuse, was the owner and operator of a certain cabin cruiser, Registry No. 300449 and that at about 4:00 o'clock a. m. on said date was aboard said cruiser on the waters of Puget Sound and in the vicinity of Point No. Point within Kitsap County. At about said time and place the defendant, Joseph Henry Harrison, was operating a tug and towing a barge, both of said vessels being owned by the defendant, Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The said Joseph Henry Harrison was the agent and employee of the said corporate defendant and acting within the course and scope of his authority as second mate of the said tug and was at all times herein mentioned in charge of the same. At the time and place hereinabove stated, the said tug was towing the aforesaid barge in a generally westerly direction on the waters of Puget Sound, and the said defendant, Joseph Henry Harrison, acting as aforesaid, negligently caused

Exhibit A—(Continued)

the said barge to collide with and sink the aforesaid cruiser owned by the deceased, Charles DeBuse, said negligence proximately causing the death of the said Charles DeBuse, and causing the damage hereinafter set forth to the said cruiser. The negligence of said Joseph Henry Harrison, acting as aforesaid, which proximately caused the death of the deceased, damage to the cruiser which was anchored, injuries to the plaintiffs George D. DeBuse, a minor and Gerald A. Dunn, who were aboard said cruiser, was as follows:

1. Failure to keep a proper look-out on the tug while navigating at full speed through waters known to be crowded with traffic.

2. Failure of the said corporation, through its agents and servants, to keep a proper look-out on the barge towed by said tug while navigating at full speed through water known to be crowded with traffic.

3. Failure to have in force an adequate system of signaling between the tug and the barge.

4. Failure to lower a boat from the tug to carry on rescue operations after the casualty.

5. Failure to take any action on the barge to rescue the deceased or the surviving plaintiffs, Gerald A. Dunn and George D. DeBuse by the bargemen.

6. Failure on discovering the anchored vessel of the deceased to steer the course of the tug sufficiently to the right to avoid collision between the anchored vessel and the barge.

Exhibit A—(Continued)

7. Failure to keep clear of the anchored vessel.

8. Travelling at a rate of speed too great at the time and place in question considering that the said tug was being operated through waters known to be crowded with traffic.

9. Failure of tug and barge, moving vessels, to keep clear of the anchored vessel.

VII.

As a result of the foregoing acts of negligence the hawser between the tug and the barge became attached to the anchor line of the cruiser upon which the plaintiffs and the deceased were anchored and pulled it sideways after which the said barge ran into the said cruiser, turning it over, causing the death by drowning of the deceased, Charles DeBuse, and personal injuries to the plaintiffs George D. DeBuse, a minor, and Gerald A. Dunn.

VIII.

As a direct and proximate result of the aforesaid negligence of the defendants the plaintiff widow and the children above mentioned have been deprived of the love, affection, companionship, care and guidance of their husband and father; that the said Charles DeBuse, deceased, was forty years of age at the time of his death by drowning and had prior to his death earned between \$2,500.00 and \$3,500.00 per year and had a normal life expectancy of twenty-seven years; that by reason of the said death the plaintiff and her said children, for whose benefit this action is prosecuted, have been dam-

Exhibit A—(Continued)

aged by being deprived of the love, affection, companionship, care and guidance of the deceased and because of his loss of earnings in the sum of One Hundred Thousand Dollars (\$100,000.00).

For the second cause of action herein the plaintiff, Evelyn M. DeBuse, as administratrix in behalf of the estate, alleges:

I.

Plaintiff Evelyn M. DeBuse is the duly qualified and acting administratrix of the estate of Charles DeBuse, deceased, having been appointed in Probate Cause No. 108317 in the Superior Court of the State of Washington for King County and as such brings this action for the benefit of said estate.

II.

Plaintiff Evelyn M. DeBuse realleges paragraphs IV, V, VI and VII of her first cause of action as though fully set forth herein.

III.

As a result of the foregoing acts of negligence the cruiser, which was anchored, owned by the marital community comprising the deceased and the said Evelyn M. DeBuse, was run down by the said barge and turned over; that the reasonable cash market value of the said cruiser was depreciated by the said collision to the damage of the plaintiff as administratrix in the sum of Four Hundred Dollars (\$400.00).

For the third cause of action herein the plaintiff Evelyn M. DeBuse, as guardian ad litem of the Minor George D. DeBuse alleges:

Exhibit A—(Continued)

I.

Realleges Paragraphs II, IV, V, VI, and VII of the first cause of action as though fully set forth herein.

II.

At the time of said collision the minor plaintiff, George D. DeBuse, was on board the said cruiser and was thrown therefrom into the waters of Puget Sound, proximately causing personal injuries to the said minor as follows:

Enlargement of the cervical glands; injury to the right loin and back in the area of the posterior spine of the ileum; contusions and muscle sprains in said area followed by muscle spasms; pain in the left ear and reddening of the throat from exposure; and, nervous shock.

That the plaintiff believes, and therefore alleges, that the nervous shock to said minor is permanent to the plaintiff's damage in the sum of Twenty Five Hundred Dollars (\$2,500.00).

For the fourth cause of action herein the plaintiffs, Gerald A. Dunn and Gladys E. Dunn, his wife, allege:

I.

Reallege paragraphs III, IV, V, VI, and VII of the first cause of action, as though fully set forth herein.

II.

At the time of said collision the plaintiff, Gerald A. Dunn, was on board the said cruiser and was

Exhibit A—(Continued)

thrown therefrom into the water of Puget Sound, proximately causing personal injuries to the said plaintiff as follows:

Pharyngitis, laryngitis, tracheitis and bronchitis; bruises and swelling of the right forearm in the middle third of the ulnar border; generalized body aching and soreness; pain in the right inguinal region; the aggravation of a hernia existing prior to said collision causing a condition hastening the descent of the hernia; and nervous shock.

That the said plaintiff believes, and therefore alleges, that the aggravation of the said hernia and its effects are permanent and that the nervous shock to said plaintiff is permanent, all to the plaintiff's damage in the sum of Thirty Five Hundred Dollars (\$3,500.00).

Wherefore, these plaintiffs pray for judgment against the defendants, and each of them, as follows:

1. In favor of plaintiff Evelyn M. DeBuse, as administratrix for the benefit of herself as the wife of the deceased, Charles DeBuse, and George D. DeBuse and Roberta DeBuse, minor children of the deceased, in the sum of One Hundred Thousand Dollars (\$100,000.00).

2. In favor of plaintiff Evelyn M. DeBuse, as administratrix of the estate of Charles DeBuse, deceased, on the second cause of action in the sum of \$400.00.

3. In favor of plaintiff, Evelyn M. DeBuse, as guardian ad litem of the minor, George D. DeBuse,

Exhibit A—(Continued)

on the third cause of action in the sum of \$2,500.00.

4. In favor of plaintiffs, Gerald A. Dunn and Gladys E. Dunn, his wife, and the marital community composed of said Gerald A. Dunn and Gladys E. Dunn, on the fourth cause of action in the sum of \$3,500.00.

/s/ KAHIN, CARMODY & PEARSON,
Attorneys for Plaintiffs.

State of Washington,
County of King—ss.

Evelyn M. DeBuse, being first duly sworn, on oath deposes and says:

That she is one of the plaintiffs in the above entitled action; that she has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

EVELYN M. DeBUSE.

Subscribed and sworn to before me this 20th day of September, 1948.

/s/ JOE S. PEARSON,
Notary Public in and for the State of Washington,
residing at Seattle.

[Title of Superior Court and Cause No. 399916.]

MOTION FOR APPOINTMENT OF
GUARDIAN AD LITEM

The plaintiff, Evelyn M. DeBuse, moves the court for an order appointment her as guardian ad litem of her minor son, George D. DeBuse.

Exhibit A—(Continued)

The motion is based upon the affidavit of the petitioner and the records and files herein.

/s/ KAHIN, CARMODY & PEARSON,
Attorneys for Plaintiffs.

State of Washington,
County of King—ss.

Evelyn M. DeBuse, being first duly sworn on oath deposes and says:

That she is the mother of George D. DeBuse, a minor, age fourteen years, and that on or about the 25th day of July, 1948, said minor was injured by a tug and tow operated by the defendants on Puget Sound. That said George D. DeBuse has a meritorious cause of action against the defendants, and that this affiant should be appointed guardian ad litem of the said George D. DeBuse for the purposes of this suit.

/s/ EVELYN M. DeBUSE.

Subscribed and sworn to before me this 20th day of September, 1948.

/s/ JOE S. PEARSON,
Notary Public in and for the State of Washington,
residing at Seattle.

[Title of Superior Court and Cause No. 399916.]

ORDER FOR APPOINTMENT OF
GUARDIAN AD LITEM

This matter having come on regularly for hearing upon the motion of Evelyn M. DeBuse that she be

Exhibit A—(Continued)

appointed the guardian ad litem of her minor son, George D. DeBuse, age fourteen years, the court having read the affidavit of said petitioner and being fully advised in the premises, it is Now Therefore

Ordered, Adjudged and Decreed that the said Evelyn M. DeBuse be and she is hereby appointed guardian ad litem of the said George D. DeBuse.

Done in open court this 20th day of September, 1948.

/s/ DONALD A. McDONALD,
Judge.

Presented by:

/s/ JOE S. PEARSON,
For Kahin, Carmody & Pearson, Attorneys for
Plaintiffs.

[Endorsed]: Filed Oct. 8, 1948.

[Title of District Court and Cause.]

BOND ON REMOVAL

Know All Persons By These Presents: That we, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, Joseph Henry Harrison and Jane Doe Harrison, his wife, defendants above named, as Principals, and United States Fidelity and Guaranty Company, a corporation duly authorized to transact a surety business within the State of Washington, as Surety, are held and firmly bound unto Evelyn M. DeBuse, Administratrix of the Estate of Charles DeBuse, deceased, Evelyn M. DeBuse,

as guardian ad litem of George D. DeBuse, a minor, Gerald A. Dunn and Gladys E. Dunn, his wife, Plaintiffs above named, and each of them, in the full sum of Five Hundred Dollars (\$500.00) lawful money of the United States of America, for the payment of which well and truly to be made we, and each of us, bind ourselves, our personal representatives, successors and assigns, jointly and severally by these presents.

The condition of the foregoing obligation is such that,

Whereas, civil action pending in the Superior Court of the State of Washington for the County of King as No. 399916, wherein Evelyn M. DeBuse, Administratrix of the Estate of Charles DeBuse, deceased, Evelyn M. DeBuse, as guardian ad litem for George D. DeBuse, a minor, and Gerald A. Dunn and Gladys E. Dunn, his wife, are plaintiffs, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation and Joseph Henry Harrison and Jane Doe Harrison, his wife, are defendants, is being removed to the United States District Court for the Western District of Washington, Northern Division, pursuant to applicable provisions of law, as disclosed by petition of said defendants being filed herewith;

Now, Therefore, if said defendants shall pay all costs and disbursements incurred by reason of said removal proceeding should it be determined that said

action was not removable or was improperly removed, then this obligation shall be void; otherwise the same shall remain in full force and effect.

Dated this 8th day of October, 1948.

(Principals.)

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation,
JOSEPH HENRY HARRISON, JANE DOE HARRISON, his wife,

By /s/ LANE SUMMERS,
Of Attorneys for Defendants.

(Surety.)

UNITED STATES FIDELITY AND GUARANTY COMPANY,

By /s/ (Illegible.)
As Its Attorney-in-Fact.

The foregoing bond approved.

Done this 8th day of October, 1948.

(Seal) /s/ LLOYD L. BLACK,
United States District Judge.

[Endorsed]: Filed Oct. 8, 1948.

[Title of District Court and Cause.]

NOTICE OF REMOVAL

To the Plaintiffs above named, and each of them, and
to Kahin, Carmody & Pearson, their attorneys:

Notice Is Hereby Given that petition for removal and bond on removal (a copy of each of which is herewith served upon you) have been filed this day with the Clerk of the United States District Court

for the Western District of Washington, Northern Division, and that like copy of said petition and of said bond, together with copy of this notice, will be filed this day with the Clerk of the Superior Court of the State of Washington for the County of King.

Dated this 8th day of October, 1948.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Attorneys for Defendants.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 9, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK
OF STATE COURT

Know All Persons By These Presents:

That I, the undersigned, Clerk of the Superior Court of the State of Washington for the County of King, hereby certify that I received from attorneys for defendants above named and filed in my office on the 8th day of October, 1948, in civil action No. 399916 between plaintiffs above named and defendants above named, copy of the following:

1. Defendants' petition for removal together with Exhibit A therein mentioned;
2. Defendants' bond on removal;
3. Defendants' notice of removal.

In Witness Whereof I have subscribed the foregoing certificate and attached the seal of the Superior Court of the State of Washington for the County of King this 8th day of October, 1948.

(Seal) NORMAN R. RIDDELL,
Clerk.

[Endorsed]: Filed Oct. 9, 1948.

[Title of District Court and Cause.]

MOTION TO REMAND

Plaintiff, on the basis of the facts alleged in her complaint and in the accompanying affidavit of Joe S. Pearson hereto attached and made a part hereof, respectfully moves this court to remand this cause to the Superior Court of the State of Washington in and for King County from which court it was attempted to be removed to this court, for the following reasons and grounds:

1. The requisite diversity of citizenship required as a condition precedent to the jurisdiction of this court in a controversy of the character presented by the record in this cause does not exist.

2. This action does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court or as to the effect or construction of some law or treaty of the United States upon the determination of which the result depends.

3. This action does not really and substantially involve a dispute or controversy which depends upon the constitution or laws of the United States and

is not exclusively within the admiralty and marine jurisdiction of this court.

4. For other reasons apparent upon the face of the record.

Wherefore, plaintiffs pray that this cause may be remanded to the Superior Court of the State of Washington in and for King County to be there proceeded with according to the practice governing such cases.

Dated this 13th day of October, 1948.

.....,
Attorneys for Plaintiffs.

AFFIDAVIT OF JOE S. PEARSON

State of Washington,
County of King—ss.

Joe S. Pearson, being first duly sworn upon oath, deposes and says:

That he is one of the attorneys for the plaintiffs in the above entitled action and makes this affidavit for and on behalf of the plaintiffs, being duly authorized to do so, for the purpose of supporting plaintiffs' motion to remand on file herein; that the plaintiff is a resident of King County, Washington, and that affiant is informed and believes, and therefore alleges, that one of the defendants, an indispensable party to this proceeding, Joseph Henry Harrison, is a resident of King County, Washington; that the deceased Charles DeBuse was not at

the time mentioned in the complaint an employee or agent of any firm or corporation engaged in maritime activities on the waters of Puget Sound; that this action is brought for wrongful death under and pursuant to the statutes of the State of Washington and that the death of the said deceased occurred within the said State of Washington.

/s/ JOE S. PEARSON.

Subscribed and sworn to before me this 13th day of October, 1948.

(Seal) /s/ CHARLES B. HOWARD,

Notary Public in and for the State of Washington,
residing at Seattle.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 28, 1948.

308 U. S. Courthouse, December 29, 1948.

Norman R. Riddell,
County Clerk,
9th Floor County-City Bldg.,
Seattle, Washington.

Dear Sir:

Pursuant to Title 28, U. S. Code, Sec. 1447, subparagraph E (being the Amended Judicial Code adopted Sept. 1, 1948) I enclose herewith a certified copy of an order remanding to the Superior Court of the State of Washington for the County of King that certain cause entitled Evelyn M. DeBuse, Ad-

ministratrix of the Estate of Charles DeBuse, etc.,
vs. Chicago, Milwaukee, St. Paul and Pacific Rail-
road Company, a corporation, et al.

Yours truly,

MILLARD P. THOMAS,
Clerk.

United States District Court for the Western
District of Washington, Northern Division

Civil No. 2112

EVELYN M. DeBUSE, Administratrix of the Es-
tate of Charles DeBuse, deceased; EVELYN M.
DeBUSE, as guardian ad litem for GEORGE D.
DeBUSE, a minor; and GERALD A. DUNN and
GLADYS E. DUNN, his wife,

Plaintiffs,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a corpora-
tion and JOSEPH HENRY HARRISON and
JANE DOE HARRISON, his wife,

Defendants.

ORDER OF REMAND

The above entitled civil action, after removal from
the Superior Court of the State of Washington for
the County of King to the above entitled court, hav-
ing come for hearing on the 28th day of December,
1948, before the undersigned Judge upon motion to
remand, and the Court having become advised from

written briefs and oral arguments of opposing counsel, submitted in behalf of both plaintiffs above named and defendants above named;

Now, Therefore, in harmony with oral ruling on said date, it is hereby Adjudged that neither said civil action as an entirety nor any separate cause of action alleged by the complaint herein was removable, and further it is hereby Ordered as follows:

1. That said civil action as an entirety, with each separate cause of action alleged by the complaint herein, is remanded to the Superior Court of the State of Washington for the County of King.

2. That costs be not allowed to or taxed for said plaintiffs.

Done in open court this 29th day of December, 1948.

LLOYD L. BLACK,
U. S. District Judge.

Exception by:

/s/ LANE SUMMERS,
Of Attorneys for Defendants.

Approved by:

/s/ JOSEPH PEARSON,
Of Attorneys for Plaintiffs.

Presented by:

/s/ LANE SUMMERS,
Of Attorneys for Defendants.

[Endorsed]: Filed Dec. 29, 1948.

Messrs. Jones & Bronson,
610 Colman Bldg.,
Seattle, Wash.

January 11, 1949

Messrs. Kahin, Carmody & Pearson,
835 Central Building,
Seattle, Washington.

Re: Evelyn M. DeBuse, Administratrix of the
Estate of Charles DeBuse, et al vs. Chicago,
Milwaukee, St. Paul & Pacific Railroad Com-
pany, et al.

Gentlemen:

Pursuant to the provisions of Rule 73(b) of the
Federal Rules of Civil Procedure, I am enclosing
herewith one copy of a notice of appeal filed January
11, 1949, in the above entitled cause, together with
one copy of the Bond on Appeal.

Yours very truly,

MILLARD P. THOMAS,
Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above entitled Court: To Evelyn
M. DeBuse, as Administratrix, Evelyn M. De-
Buse as Guardian, Gerald A. Dunn and Gladys
E. Dunn, being all plaintiffs above named; and
to Kahin, Carmody & Pearson and Jones & Bron-
son, their attorneys:

Notice Is Given that Chicago, Milwaukee, St. Paul
& Pacific Railroad Company, a corporation, Joseph
Henry Harrison and Jane Doe Harrison ,his wife,

being all defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain final order in the above entitled action entered upon the 29th day of December, 1948, by the United States District Court for the Western District of Washington, Northern Division, remanding said action from that court to the Superior Court of the State of Washington for the County of King.

Dated this 11th day of January, 1949.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,

Attorneys for Defendants.

[Endorsed]: Filed Jan. 11, 1949.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Persons By These Presents:

That Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, Joseph Henry Harrison and Jane Doe Harrison, his wife, defendants above named, as Principals, and United States Fidelity and Guaranty Company, a corporation duly authorized to transact a surety business within the State of Washington, as Surety, are held and firmly bound unto Evelyn M. DeBuse as Administratrix, Evelyn M. DeBuse as Guardian, Gerald A. Dunn and Gladys E. Dunn, plaintiffs above named, in the full sum of Two Hundred and Fifty Dollars (\$250.00), for the payment of which well and truly

to be made we bind ourselves, our representatives, successors and assigns jointly and severally by these presents.

Whereas, in the above entitled action final order was entered in favor of said plaintiffs against said defendants by the United States District Court for the Western District of Washington, Northern Division, on the 29th day of December, 1948, remanding said action to the Superior Court of the State of Washington for the County of King, from which final order said defendants are appealing to the United States Court of Appeals for the Ninth Circuit in the time and manner provided by law;

Now, Therefore, the condition of the foregoing bond is such that if said principals shall pay in full all costs if said appeal is dismissed or said order is affirmed, or all such costs as the appellate court may award if said order is modified, then this bond shall be void; otherwise it shall continue in full force.

Dated this 11th day of January, 1949, at Seattle, Washington.

(Principals.)

CHICAGO, MILWAUKEE, ST. PAUL AND
PACIFIC RAILROAD COMPANY, a corporation;
JOSEPH HENRY HARRISON, JANE
DOE HARRISON,

By /s/ LANE SUMMERS,

One of Their Attorneys.

(Surety.)

UNITED STATES FIDELITY & GUARANTY
COMPANY,

(Seal) /s/ (Illegible.)

Its Attorney-in-Fact.

[Endorsed]: Filed Jan. 11, 1948.

[Title of District Court and Cause.]

December 28, 1948

Black, J.

ORAL DECISION BY COURT ON
MOTION TO REMAND

The Court: In this case of Evelyn M. DeBuse and others, plaintiffs, versus Chicago, Milwaukee, St. Paul & Pacific Railroad Company and others, defendants, the plaintiffs seek in four causes of action to recover a total judgment of approximately \$106,400. Of that amount, as I remember it, \$100,000 is sought to be recovered for the death of Charles DeBuse. The action was started in the Superior Court of the State of Washington for King County. Both parties agree upon this motion of the plaintiffs to remand the four cases to the Superior Court of the State of Washington to the following:

1. That the action was properly instituted originally in the Superior Court of the State of Washington.

2. That it could properly have been instituted originally in this court.

Under Sections 1331-33 of the new judicial code, effective September 1 of this year, and Section 1441 of the same judicial code, it is clear that the action was not properly removable to this court unless at least one of the four causes of action was founded on a claim or right arising under the Constitution, treaties or laws of the United States as specified in subdivision (b) of such Section 1441 of the new judicial code. If any of said four causes of action

is founded on a claim or right arising under the Constitution, treaties or laws of the United States, then the entire action is removable, but in the event some of the causes of action if started independently would not have been properly removable, this district court has this election, first, to determine all the issues in the four causes of action, or in its discretion to remand all matters not otherwise within its original jurisdiction.

That last language is somewhat confusing. I am satisfied, however, that it would properly mean that if the cause of action in which plaintiffs seek to recover only \$400 was the only one properly removable to this court, that the court would not be compelled against its wish to try the three other causes of action involving \$106,000. I confess that the language of that proviso for remanding a portion of the causes of action is not as happy or as clear as I wish it had been.

It apparently is conceded by both sides that there is no right of removal to this court from the state court of any of such four causes of action upon the ground of diversity of citizenship. The issue then is squarely dependent upon whether or not any of the four causes of action combined in the complaint are founded on a claim or right arising under the Constitution, treaties or laws of the United States.

The plaintiffs vigorously contend that each and all of the four causes of action depend upon state law. The defendants at least as vigorously contend that each of the four causes of action is founded on rights or claims arising under the maritime law, and in such connection most vigorously assert that the

maritime law, whether of statute or decision, is the law of the United States. Thus the defendants contend that any civil action of maritime jurisdiction, regardless of amount involved or of the citizenship of the defendants may be removed properly to the federal court.

The defendants in this case have not given me any assistance upon one problem that perplexes me, and that is whether or not the second, third and fourth causes of action, or any of them have any greater right to be in this court than the first death cause of action. Plaintiffs have attempted to give me some assistance on that perplexing problem. If they have given me the assistance I needed, I have not been appreciative of their having solved the question. That means that plaintiffs may have fulfilled their duty in that respect and that I have failed to understand.

I am not convinced that the maritime law is necessarily the law of the United States as contemplated by the language of subdivision (b), Section 1441, where it is stated that a requisite for removal to the district court is that a civil action is founded on a claim or right arising under the Constitution, treaties or laws of the United States. Section 1333 of the Judicial Code does say that the district court shall have original jurisdiction exclusive of the courts of the state of any civil case of admiralty or maritime jurisdiction, saving to the libelant or petitioner in every case any other remedy to which he is otherwise entitled. But I am not convinced that when this Section 1333 says that the district courts shall have original jurisdiction of a civil case of maritime juris-

diction that that necessarily means that the maritime law is the law of the United States in the sense referred to in the subdivision (b) of Section 1441. In fact, in many instances I am satisfied from the decisions that the district courts have original jurisdiction of maritime cases arising under the state law. Such decisions do not appear to me to say that the state law has become the law of the United States. Such decisions to me seem to say that the district courts shall have original jurisdiction of such maritime cases although they are enforcing state laws.

I have no absolute confidence in the correctness of my conclusion. Much of Mr. Summers' able argument is most persuasive to me. Much of it is persuasive by reason of the argument itself. Considerable of it is persuasive to me because I recognize him as an expert in the field of maritime jurisprudence. I have to decide this matter, however, upon the way it appeals to me. I cannot delegate my decision to an attorney or proctor learned in the law of admiralty. The argument as presented to me by counsel for the plaintiffs is more persuasive to me than is that of the defendants, that is, I am much more inclined to the opinion that these causes of action are not founded on a claim or right arising under the Constitution, treaties or laws of the United States than I am that they are founded on a claim or right arising under the Constitution, treaties, or laws of the United States.

It seems to me, as stated in the case of *Western Fuel Company vs. Garcia*, 66 Law Edition 210, that the rules accepted and applied in admiralty courts are controlling wherever this action shall be tried,

whether in this court or the Superior Court of the State of Washington. Again, the fact that the rules accepted and applied in the admiralty and maritime courts of the United States may control does not make the claims or rights founded on the Constitution, treaties or laws of the United States.

I have already conceded that I am not confident that I am correct. I think, however, that it is more likely that I am correct in ordering these four causes of action remanded to the Superior Court than I would be in denying such motion to remand.

In addition, the issue is very important. If in every civil case, regardless of amount of citizenship, based upon a maritime condition the action is removable to the federal court, that should be soon known. My order to remand will give an opportunity to appeal and secure an early determination of this perplexing question. My refusal to remand it would delay that determination for a long time.

Personally, I have not thought it made much difference in this action whether the action stayed here or was remanded to the state court. Respective counsel, however, unquestionably differ much with me on that issue. I can think of a number of reasons that might appeal to either counsel, but I confess they would not appeal to me as very vital if I were the attorney on either side of this case. However, I am not.

Plaintiffs have the right to have this case tried in the state court if the defendants had no right to remove it. The defendants, of course, are entitled to have it tried in this court if the action was properly removable. I hold that I am more satisfied

that it was not properly removable than the contrary.

The motion to remand is granted and exception allowed.

Mr. Pearson: Will the Court indicate whether costs are to be awarded in connection with the order to remand?

(Discussion off the record with the consent of all counsel.)

The Court: Under the circumstances, counsel, if the allowance or disallowance of costs is discretionary with me, no costs will be allowed. I hope counsel can agree upon the question at the time order is presented. Thank you.

CERTIFICATE

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYSE,
Official Court Reporter.

[Endorsed]: Filed Jan. 20, 1949.

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF RECORD
ON APPEAL

Pursuant to Federal Rules of Civil Procedure Rule 75(o) and Rule 11(1) of the United States Court of Appeals for the Ninth Circuit (in the absence of stipulation), appellants above named hereby designate the entire record in the above entitled action, including all original papers on file, as and for the record on appeal in said action to the United States Court of Appeals for the Ninth Circuit, it being hereby requested that all of such original papers, with identifying certificate appended thereto, be transmitted forthwith to the Clerk of said appellate court.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Attorneys for Appellants,
(Defendants).

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 15, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The appellants above named upon their appeal in the above entitled action rely upon the following points:

1. That the above entitled action, involving a maritime tort—a collision between vessels in navigable waters of Puget Sound—arises under the Constitution and laws of the United States and within the admiralty and maritime jurisdiction thereof;

2. That the United States District Court for the Western District of Washington, Northern Division, has original jurisdiction respecting the above entitled action, considered entirely, and each cause of action alleged by the complaint herein, considered separately—all without regard to diversity of citizenship or amount in controversy;

3. That the above entitled action as a whole and all causes of action alleged by the complaint herein are removable from the Superior Court of the State of Washington for the County of King to the United States District Court for the Western District Court of Washington, Northern Division;

4. That the United States District Court for the Western District of Washington, Northern Division, erred in failing to maintain its said jurisdiction respecting the above entitled action and all causes of action alleged by the complaint herein;

5. That the United States District Court for the Western District of Washington, Northern Division, erred in remanding said action and all causes

of action alleged by the complaint herein by its "Order of Remand" entered on the 29th day of December, 1948, from which appellants have appealed.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Attorneys for Appellants,
(Defendants).

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 15, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO ORIGINAL
RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended of the United States Court of Appeals for the Ninth Circuit, I am transmitting herewith all of the original pleadings on file and of record in said cause in my office at Seattle as requested in the designation of counsel for appellants, as follows:

1. Petition for Removal, filed Oct. 8, 1948.

2. Bond on Removal, filed Oct. 8, 1948.
3. Notice of Removal, filed Oct. 9, 1948.
4. Certificate by Clerk of State Court, filed Oct. 9, 1948.
5. Motion to Strike, filed Oct. 27, 1948.
6. Motion to Remand, filed Oct. 28, 1948.
7. Motion of Hearing Motion to Remand, filed Oct. 28, 1948.
8. Affidavit of Joe S. Pearson, filed Oct. 28, 1948.
9. Plaintiffs' Trial Memorandum on Motion to Remand, filed Nov. 18, 1948.
10. Defendants' Brief Resisting Motion to Remand, filed Nov. 30, 1948.
11. Plaintiffs' Revised Trial Memorandum on Motion to Remand and Reply Brief to Defendants' Brief Resisting Motion to Remand, filed Dec. 6, 1948.
12. Defendants' Second Brief Supporting Removal, filed Dec. 13, 1948.
13. Plaintiffs' Supplemental Memorandum of Authorities on Motion to Remand, filed Dec. 20, 1948.
14. Plaintiffs' Second Supplemental Memorandum of Points and Authorities on Motion to Remand, filed Dec. 28, 1948.
15. Order of Remand, filed Dec. 29, 1948, with Clerk's copy of letter to Riddell attached.
16. Notice of Appeal, filed Jan. 11, 1949, with Clerk's copy of letter to attorneys attached.
17. Bond on Appeal, filed Jan. 11, 1947.
18. Oral Decision by Court on Motion to Remand, filed Jan. 20, 1949.

19. Appellants' Designation of Record on Appeal, filed Feb. 15, 1949.

20. Statement of Points, filed Feb. 15, 1949, and that said pleadings and papers constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit from Order of Remand filed and entered in this cause December 29, 1948.

In Witness Whereof I have hereunto set my hand and official seal at Seattle, this 16th day of February, 1949.

(Seal) MILLARD P. THOMAS,
Clerk.

[Endorsed]: No. 12187. United States Court of Appeals for the Ninth Circuit. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, and Joseph Henry Harrison and Jane Doe Harrison, his wife, Appellants, vs. Evelyn M. DeBuse, Administratrix of the Estate of Charles DeBuse, deceased, Everyn M. DeBuse, as Guardian ad Litem for George D. DeBuse, a minor, and Gerald A. Dunn and Gladys E. Dunn, his wife, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 17, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12187

EVELYN M. DeBUSE, Administratrix of the Estate of Charles DeBuse, deceased; EVELYN M. DeBUSE, as Guardian ad Litem for GEORGE D. DeBUSE, a minor; and GERALD A. DUNN and GLADYS E. DUNN, his wife,

Appellees,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a corporation, and JOSEPH HENRY HARRISON and JANE DOE HARRISON, his wife,

Appellants.

APPELLANTS' DESIGNATION OF
PORTIONS OF RECORD TO BE PRINTED

Pursuant to Rule 19(6) of the United States Court of Appeals for the Ninth Circuit, appellants above named hereby designate for printing by the Clerk of the United States Court of Appeals for the Ninth Circuit as being all of the record on file in the above entitled action material to the consideration of such appeal by said Court, the following:

1. Petition for Removal;
2. Complaint of the plaintiffs, contained in Exhibit A attached to the Petition for Removal;
3. Bond on Removal;
4. Notice of Removal;
5. Certificate by Clerk of the state court;

6. Motion to Remand;
7. Opinion of United States District Judge ruling upon Motion to Remand;
8. Order of Remand;
9. Notice of Appeal;
10. Bond on Appeal;
11. Appellants' Designation of Record on Appeal;
12. Appellants' Statement of Points;
13. Appellants' Designation of Portions of Record to be Printed.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Attorneys for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed February 17, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANTS' AFFIRMATION AND
ADOPTION OF STATEMENT OF POINTS

Appellants hereby adopt and affirm "Statement of Points" (heretofore served upon appellees and filed with the Clerk of the lower court, and now contained in record on appeal) as Statement of Points required by Rule 19(6) of the rules of the above entitled Court.

THOMAS H. MAGUIRE,
BYRON E. LUTTERMAN,
MERRITT, SUMMERS &
BUCEY,

/s/ LANE SUMMERS,
Attorneys for Appellants.

(Acknowledgment of Service.)

[Endorsed]: Filed February 23, 1949. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF ADDI-
TIONAL PORTION OF RECORD
TO BE PRINTED

Pursuant to Rule 19(6) of the United States Court of Appeals for the Ninth Circuit, appellees above named hereby designate for printing by the Clerk of the United States Court of Appeals for the Ninth Circuit as being a portion of the record on file in the above entitled action and material to the consideration of such appeal by said Court and in addition to that heretofore designated for printing by appellants, the following:

1. United States District Clerk's copy of letter to Norman Riddell, King County Clerk, which is attached to order of remand filed December 29, 1948.

KAHIN, CARMODY &
PEARSON,

/s/ JOSEPH H. PEARSON,
JONES & BRONSON,

/s/ HARRY B. JONES, JR.,
Attorneys for Appellees.

(Acknowledgment of Service.)

[Endorsed]: Filed February 25, 1949. Paul P. O'Brien, Clerk.